SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 116.

JOHN H. MING AND JOHN KINNA, PLAINTIFFS IN ERROR,

vs.

ALEXANDER M. WOOLFOLK.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF MONTANA.

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1 In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JOHN KINNA and JOHN H. MING, Plaintiffs,
vs.
ALEXANDER M. WOOLFOLK, Defendant.

Be it remembered that among the pleadings, records, & proceedings filed, made, & had in the above-entitled action in the said district court are the following, to wit:

On the 18th day of June, A. D. 1877, the plaintiffs filed their amended complaint in said action, in the words & figures following, to wit:

In the Third Judicial District Court in & for the County of Lewis & Clarke, Montana Territory.

JOHN KINNA and JOHN H. MING, Plaintiffs,
vs.
ALEXANDER M. WOOLFOLK, Defendant.

Now come the plaintiffs and, by leave of the court for that
2 purpose first had and obtained, for amended complaint in this action allege:

That on the 16th day of September, A. D. 1874, the said John Kinna, John H. Ming, & Alexander M. Woolfolk made & entered into a certain contract or agreement in writing, whereby the said defendant Woolfolk, for a valuable consideration, promised to pay, under certain conditions therein named, divers sums of money, which said contract or agreement is in the words and figures following, to wit:

"HELENA, *Sept.* 16, 1874.

"Whereas John Kinna and John H. Ming have this day joined with me in borrowing the sum of (2,572.10) twenty-five hundred & seventy-two and $\frac{10}{100}$ dollars, for the purpose of paying R. S. Hale the balance of eight thousand dollars due him under private agreement with said Ming, Kinna, and Woolfolk, in order for their release from certain notes executed by them to said Hale, as security for the Park Ditch Company; and whereas the Park Ditch Co. has pledged the note of William Chessman to it, and its claim against Felix Poznainsky, and any other demands due it to the extent of repaying to the said Ming, Kinna, & Woolfolk the sum of $2,572.10,
3 this day borrowed; Now, therefore, the said Woolfolk does hereby agree that if he shall collect any of the above amounts or shall from any resources whatever of the Park Ditch Company receive any other sums after deducting all costs, charges, & expenses, to apply the same in payment of said note, and also another note executed to R. S. Hale for taxes, amounting to between six & seven hundred dollars, until said notes shall be fully paid, said payments to be made by the said Woolfolk after his return from the East next spring and as soon thereafter as the amounts shall be re-

ceived; but the said Woolfolk does not assume to pay said note only to the extent that he shall receive such amounts from the resources of the Park Ditch Co. as aforesaid.

(Signed) A. M. WOOLFOLK.

And that the said Woolfolk then & there delivered the said agreement to said plaintiffs.

And these plaintiffs aver that as an inducement to the said plaintiffs to consent to join with him, said Woolfolk, in borrowing said sum of money and thereby to procure the release of said Ming, Kinna, and Woolfolk, from certain notes by them jointly executed and to pay to said Hale the sum mentioned in the said agree-
4 ment as due to said Hale, the said Woolfolk, prior to and at the time of the receipt of the said agreement by said plaintiffs from said defendant, and the borrowing of the said sum of $2572.10 by them as aforesaid, stated and represented to these plaintiffs that the said Park Ditch Company had passed a resolution in conformity with the recitals in said agreement above herein set forth, in and by which the said Park Ditch Company had pledged the said note of the said William Chessman & its claims against the said Felix Poznainsky and all of the resources of the said Park Ditch Company, including all receipts by the Park Ditch Company from water sold and to be sold by it, to the extent of the repayment to the said plaintiffs and said Woolfolk of the said sum of $2,572.10 so to be borrowed by said Ming and Kinna and Woolfolk, for the purpose aforesaid.

And the said plaintiffs further say and aver that they, relying entirely upon the truth of the representations so made by the said Woolfolk, and solely induced thereby, did execute, together with said Woolfolk, their promissory note for the sum of $2,572.10, and thereon borrowed that sum, which was paid to said Hale at its ma-
5 turity in accordance with the tenor and effect thereof and of the said agreement.

And these plaintiffs further say that until long after the maturity of said note, and the payment by them of the same, as hereinafter mentioned, they were in entire ignorance of the fact that said representations of said Woolfolk were not made in good faith, and that said representations were untrue, and that no such resolution as said defendant represented had been passed *had actually been passed* by the said Park Ditch Company.

And the plaintiffs further state that since the commencement of this action, and about the 9th day of June, 1877, they, for the first time, learned that no such resolution was to be found upon the records of said Park Ditch Company, but that the said representation of said Woolfolk as to the passage thereof was untrue; and they further aver that it was well known to defendant at the time that such representation was untrue.

And the plaintiffs charge and aver that the said defendant is now, by reason of his said representation that such resolution had been so passed by said Park Ditch Company, and by which repre-
6 sentation these plaintiffs were induced to borrow said money, estopped from denying and proving that, in fact, no such

resolution had been passed. And the said plaintiffs further aver that, upon upon the maturity of said note for the said sum of $2,572.10, to wit, on the 14th day of October, 1874, they paid two-thirds of the amount thereof, with interest thereon at the rate of two per cent. per month for the period of thirty days, according to the tenor and effect thereof, amounting to the sum of $1.810.14; and that afterward, to wit, on the 23d day of August, 1875, the said plaintiffs paid two-thirds of the said note, in the said agreement mentioned as due Robert S. Hale for taxes, the same amounting, with interest due thereon, to the sum of $445.50.

That no part of the aforesaid sums of money has been repaid to the said plaintiffs, and that there is now due, on account thereof, the said several sums of money above mentioned, with interest thereon from the dates of the respective payments thereof by these plaintiffs.

And plaintiffs further aver that the said defendant did return
7 from the East about the 1st day of May, 1875, & entered into & took possession, control, and management of the said Park Ditch, and the control and management of the affairs of said company, and that he, the said defendant, continued in the possession of the said ditch, and receiving all the receipts and moneys thereof during the water season of A. D. 1875, to wit, from the 1st day of May to the 1st day of September, and that during said period of time collected and received the amount due on said Chessman note and the amount of the claims of the Park Ditch Company against said Poznainsky, amounting in the aggregate, as plaintiffs are informed and believe, to about the sum of $3,000.00 and upwards; and also received large sums of money from sales of water and resources of the Park Ditch Company, as these plaintiffs aver on information and belief, to upwards of the sum of $3,500.00; that said defendant should have applied a sufficient amount of said sums of money so received by him as above stated to the payment of the aforesaid sums of money so paid by these plaintiffs as aforesaid, being the sum in all of $2,255.64 paid, laid out, and expended by them as above set forth, but to so apply any portion of said moneys
8 received by him, or to pay or discharge any portion thereof, the said defendant has refused and still does refuse.

And plaintiffs aver that by means and by reason of all of said premises said defendant became and is liable to pay those plaintiffs the said sum of $2,255.64, with interest thereon as aforesaid.

Wherefore the plaintiffs demand judgment against said defendant for the sum of $2,255.64, with interest on said several sums of money so paid by them from the respective dates of the payment thereof, at the rate of ten per cent. per annum, besides costs.

CHEEMASERO & CHADWICK,
Plaintiffs' Attorneys.

TERRITORY OF MONTANA, } ss:
Lewis & Clarke County, }

John H. Ming, being first duly sworn, says he is one of the plaintiffs named in the foregoing action; that he has heard the foregoing

complaint read and knows the contents thereof; that the matters therein set forth of his own knowledge are true, and the matters stated on his information & belief he believes to be true.

9 J. H. MING.

Subscribed & sworn to before me this 18th day of June, 1877.

WM. CHUMASERO,
Notary Public.

And on the 7th day of April, A. D. 1880, the defendant, Alex. M. Woolfolk, filed in said action his amended answer to plaintiffs' amended complaint in words & figures following, to wit:

Amended Answer.

In the Circuit Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JOHN KINNA & JOHN H. MING, Plaintiffs,
vs.
ALEX. M. WOOLFOLK, Defendant.

And now comes Alexander M. Woolfolk, the above-named defendant, and, leave of the court having been first had and obtained, files this his amended answer to the amended complaint of plaintiffs on file herein & for such amended answer; admits the execu-
10 tion of the instrument herein sued on, but denies that there was any valuable consideration for the execution thereof, and denies that there was any consideration for the execution thereof, save and except as in said instrument is set forth and expressed. Denies that this defendant, prior to or at the time of the receipt by plaintiffs, or either of them, of said instrument, or prior to or at the time of borrowing the said sum of $2,572.10, or any other time whatever, as an inducement to the said plaintiffs, or either of them, to consent to join with defendant in borrowing said sum of $2,572.10, or any other sum, and thereby procure the release of said Ming, Kinna, & Woolfolk from certain notes by them jointly executed, or to pay to said Hale the sum mentioned in the said instrument as due to said Hale, or any other sum, or to any other person whomsoever or at all, this defendant ever stated or represented to plaintiffs, or either of them, that the said Park Ditch Company had passed a resolution in or by which the said Park Ditch Company had pledged all of the resources of the said Park Ditch Company, including all or any receipts by said Park Ditch Company from water sold or to be sold by it to the extent of the
11 repayment to the said plaintiffs and this defendant, or either of them or any of them, of the said sum of $2,572.10, or any part thereof, or at all, & defendant avers that the allegation of said amended complaint in that behalf is utterly false and untrue; and defendant further avers that the Park Ditch Company named in said instrument was a corporation duly incorporated under & by virtue of the laws of said Territory of Montana.

Denies that said plaintiffs, or either of them, in the execution of

said or any promissory note relied entirely or at all upon the truth of said or any other representations of defendant, or that plaintiffs, or either of them, were solely or at all induced by such or any representations of defendant to join in the execution of said or any note, or to borrow said or any sum of money.

Denies that by reason of any statement or statements, representation or representations ever made by this defendant, he is estopped from denying or proving that no resolution pledging the receipts from sales of water for the season of 1875 to plaintiffs & defendant was ever made; and defendant denies that any such resolution
12 was ever made or passed by said Park Ditch Company.

Denies that on the first day of May, 1875, or at any other time in said year, this defendant entered into and took the control and management of the said Park Ditch Company or the possession of said Park Ditch.

Denies that this defendant ever collected or received the amount due on said Chessman note, or any part thereof, or the amount of the claim of said Park Ditch Company against said Felix Poznainsky, or any part of either of the said claims; and defendant avers that said claim against said Poznainsky is still due and wholly unpaid, and as to the said Chessman note defendant avers that the same never came into the possession of this defendant.

Denies that defendant received or that there ever came into his hands from sales of water, or from any other resources of the said Park Ditch Company, during the season of 1875, or at any other time after the execution of the said instrument sued on, the sum of three thousand five hundred dollars, or any other sum or amount whatever after deducting costs, charges, and expenses.

13 Denies that defendant is liable to pay to plaintiffs, or either of them, the said sum of $2,255.64, or any other sum or amount whatsoever, and denies that he is in any way or at all indebted to said plaintiffs, or either of them, upon any account or in any sum or amount whatever.

Wherefore, having fully answered, defendant asks to be discharged with his costs in this behalf expended.

E. W. TOOLE,
JOHN H. SHOBER, &
M. BULLARD,
Attorneys for Defendant.

(Here follows verification, in due form.)

And on the 16th day of June, A. D. 1877, the plaintiffs filed in said action their replication to defendant's answer, of which the following is a copy, to wit:

Replication.

In District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JOHN KINNA & JOHN H. MING
vs.
ALEX. M. WOOLFOLK.

And now come the above-named plaintiffs, and, for replication to the amended answer herein, deny, on information and belief,
14 that the receipts of the said Park Ditch Company for the year 1875 were assigned or pledged by the said Ditch Company to A. J. Davis, W. C. Gillette, and Samuel Schwab to indemnify them against certain liabilities assumed by them on behalf of the said company.

Plaintiffs deny that the said Davis, Gillette, and Schwab ever assumed or incurred any liability on behalf of said company.

Deny that the said Davis, Gillette, & Schwab ever received or held such receipts for the year 1875 of the said company, save as trustees for it.

Plaintiffs aver that on or about the — day of November, A. D. 1875, the said action of Robert S. Hale against the Park Ditch Company was dismissed, and all claims on the part of the said Hale to the receipts of the said Park Ditch Company for the year 1875 were relinquished, and all moneys that had been placed to the credit of Davis, Gillette & Schwab were, long time prior to the date last named, paid to the said defendant, or upon his order to other parties, and, under the direction of the said defendant, the said receipts were diverted from the said plaintiffs.

15 Wherefore the plaintiffs demand judgment as prayed for in their complaint.

CHUMAZERO & CHADWICK,
Plaintiffs' Attorneys.

Here follows verification in due form:

And on the 30th day of May, A. D. 1881, the plaintiffs filed their statement on appeal in said action, of which, in words & figures, the following is a copy, to wit:

Statement on Appeal.

LEWIS & CLARKE COUNTY, *Montana Territory:*

In the District Court, Third Judicial District.

JOHN H. MING, Plaintiffs, *vs.* ALEX. M. WOOLFOLK, Defendant.

Be it remembered that on the 12th day of May, A. D. 1881, that being one of the days of court of the May term, A. D. 1881, of the district court aforesaid, upon the trial of the above-entitled cause to a jury, the plaintiffs to maintain the issues on their part, introduced the plaintiff, JOHN H. MING, who, first being duly sworn as a
16 witness in his own behalf, and in behalf of his co-plaintiff, testified substantially as follows:

"I am one of the plaintiffs. I know the defendant, Alex. M. Woolfolk. He was the chief manager of the Park Ditch Company in the fall of 1874. I do not know that he was superintendent. Kinna & myself had a conversation with him on the day before or on the same day of the date of this contract (referring to the contract set up in the complaint). The conversation took place in my office, in the rear of my store in Helena, M. T. Defendant said that the balance of the $8,000.00 which we owed Mr. Hale was due, and that the ditch company had not the money to pay it, and that he had a plan to propose or a proposition to make by which we could make it without incurring any loss to ourselves; that if we would join him & give a note to the First National Bank and borrow the money he would get the company to turn over the receipts for water to be sold the following season, and any other sums they might be able to collect, to reimburse us in the amount, which was $2,572, and also a note which had been given for taxes, of over $600.00. I told defendant that we would
17 or could not get the receipts of the ditch if it was sold in January under the mortgage, as it would be, probably. He then explained to us the provisions of the redemption law giving us six months to redeem in after the sale, and said that we could hold the ditch for that time, and that two months of it would be the best of the water season in which he could collect sufficient money, after paying all expenses to reimburse us and pay us back fully the sums mentioned. We agreed to do this if the company would pass a resolution pledging us the receipts, for 1875 for this purpose. The defendant then left but returned the same day and brought us this contract (referring to contract set up in the complaint) signed by himself, and told us that the company had had a meeting and passed a resolution in accordance with his proposition and this agreement. Kinna was present at this time and we then signed the note for $2,572.10, which note was afterwards paid, and also the note for $605.00 given for taxes. Kinna, Woolfolk, & myself each paid our part of these notes. Defendant returned in the spring of 1875, and, I think, took charge of the Park Ditch. The only knowledge I have of
18 the receipts of the Park Ditch for the year A. D. 1875, was contained in a written proposition made by the defendant to Mr. R. S. Hale, which statement is now lost. I saw it once; it was in the handwriting of the defendant, with which I am well acquainted. In that writing it was stated that the net receipts of the ditch for the year A. D. 1875 was $3,500.00, or about that sum. At the time of borrowing the money I accepted the statement of the defendant that the company had passed the resolution pledging the water receipts of 1875 to us, as true, and relied upon them, and in consequence thereof executed the note. I did not learn that this statement was false until the following season, when I ascertained that defendant had attempted to pledge the receipts of that season to Mr. Geo. W. Fox to secure a private indebtedness of his own. I accepted his representation as true, and was thereby induced to sign the note to raise the money."

The witness being cross-examined by defendant, testified as follows:

"I do not remember the date when I discovered that no such resolution had been passed by the company, but it was upon the
19 occasion named. At the time of giving our note to the bank we were responsible to Mr. Hale for between $16,000 & $18,000.00. We had an agreement with him that if we paid him $8,000, of which this $2,572 was the balance, he would release us from all liability."

Thereupon defendant asked the witness the following questions, to wit:

1. What was the condition of the Park Ditch Company as to solvency or insolvency at that time?

2. In entering into this arrangement and giving this note to the bank, were you influenced by a desire to obtain a release of your liability to Hale?

3. Was it necessary for you & Kinna to join in borrowing this money in order to be released from liability to Hale?

4. Had you & Mr. Kinna been very uneasy about this security debt prior to and up to the time of paying this $2,572?

5. Did you have any security for endorsing to Hale?

6. At the time you became liable to Hale, what amount of mortgages was there ahead of yours on the property of the company?

20 7. At the time you became liable to Hale, what did you consider the Park Ditch worth?

8. How long had you been indebted to Hale?

9. Did you not in the summer of 1874 notify Hale to take steps to collect his debt?

10. Did you not refuse to withdraw this notice unless the receipts of 1874 were assigned to Hale, and the $8,000 agreement was made?

To each of which questions the plaintiffs then and there severally objected; but the court overruled such objection and permitted the said questions to be answered, to which ruling of the court in so permitting the same to be answered, the plaintiff then and there, and to the ruling upon each of said questions and objections, duly excepted.

And the witness further testified on cross-examination, as follows:

"At the time we made the agreement with Hale for the payment of $8,000, and our release from all liability to him, I regarded the Park Ditch Company as hopelessly insolvent. There was a mortgage of $6,000, and one of $3,600 to Hale upon the ditch, bearing interest at 2% per month from 1871 or 1872,
21 the principal & interest upon the notes due Hale amounting to $15,000, which was secured by mortgage upon the ditch. Mr. Hale held other notes of the company, amounting to between $16,000 & $18,000, for which Kinna, Woolfolk and myself were security. We had no security except an indemnity mortgage on the ditch, which was subordinate to the other mortgages to Hale upon the ditch which I have mentioned. This in-

debtedness, for which we are security, was bearing interest at the rate of 2% per month. In the fall of 1873, Mr. Kinna & myself were uneasy on account of our large liability for the company, for which we felt we had no security. We did notify Mr. Hale at that time that he must take steps at once to collect his indebtedness against the Park Ditch Company; and that if he did not do so we would no longer be responsible to him as securities upon the notes. After we gave this notice there was a meeting of the trustees of the Ditch Company, to which I communicated a conversation which I had had with Mr. Hale, in which Hale proposed that if the company would assign the receipts of the season of 1874 to him, and we would during said season pay to him from the resources
22 of the company the sum of $8,000 upon the indebtedness for which we were securities, and would then sell the Park Ditch under our indemnity mortgage, that Hale would bid at the sale of the ditch a sum sufficient to pay the amount for which we were security, and would discharge us from further liability to him thereon.

Mr. Kinna and myself were in favor of this arrangement, and Mr. Woolfolk also consented to it. The trustees of the company then passed a resolution in accordance with that proposition, pledging the receipts of 1874 to Hale, and Kinna, Woolfolk, and myself made an agreement with Hale with reference to the $8,000 payment, and our release upon selling the ditch thereafter under our mortgage. My recollection is that Mr. Hudnall, as agent of Mr. Hale, was to collect the receipts under the agreement, which were all of the receipts of the Park Ditch and one-third of the receipts of the Tucker Extension, the remaing two-thirds of the extension receipts belonging to Mr. Woolfolk. During the year 1874 the total net receipts of the Park Ditch Company only amounted to about $3,500. This amount was increased by
23 about the sum of $2,000, which I had formerly collected as treasurer, and accounted for at this time. The total still lacked $2,572.10 of paying the $8,000 to Hale, in order to secure our release under the agreement. The receipts of the ditch in 1874 were not sufficient to pay the interest upon the company's indebtedness. We were bound to pay this $2,572.10 in order to secure our release from the indebtedness for which we were still security to Hale, and which amounted, after deducting the payments then made, to about $11,000.00 or $12,000.00. We would have paid this $2,572.10 to Hale, as it was necessary to secure our release from our indebtedness to him, whether the receipts of 1875 had been assigned to us or not.

We might not have borrowed the money, if the statements of Woolfolk had not been made to us. If we had not borrowed the money we would simply have walked up to Mr. Hale & paid him the money, instead of borrowing the amount. We would have been compelled to have paid him in some way, for he had our notes, & we desired to be released. I am unfriendly to the defendant

Woolfolk. I think we paid the note for $2,572.10, which we
24 had borrowed from the National Bank in the spring of 1875.
The representations of Woolfolk with reference to the pledge of the company's receipts were made on the day he gave us the agreement sued on. He said the Park Ditch Company had assigned to us the Chessman and Poznainsky notes and the receipts of 1875. I told him I did not think we could get the receipts of 1875, as Hale would be entitled to them. He then explained that under the redemption law we would have two months' receipts; that the sale would not occur until January.

The witness was here shown an agreement with Hale, to which the signature of himself, Kinna, and Woolfolk were attached, providing that the ditch should be foreclosed at the beginning of the November term, 1874, of the district court of Lewis & Clarke county, under their indemnity mortgage, and he said:

"I recognize my signature. I had forgotten the agreement. There was an agreement by the Park Ditch Company to make no defense to our action of foreclosure. If the ditch was foreclosed at the November term, according to this agreement, I suppose it would have been sold
before January, probably early in December. If the ditch had
25 been sold December the 1st there would have been no receipts
prior to the expiration of the redemption, because the water would not begin to run until about the middle of May. I do not know the reason why the ditch was not sold until the 20th of January; do not remember that it was in consequence of an error in the publication of the sheriff's notice of sale. I do not remember that Woolfolk said to me that the ditch would not be sold until January, but I got the impression that it would not be sold until that time. I do not know where I got that impression. There was a contest in May, 1875, between the Park Ditch Company and Hale over these receipts. Hale brought an action to recover them and prayed for the appointment of a receiver."

Witness was here shown an affidavit furnished by him to Hale in said action to enable Hale to recover said receipts, and said:

"I recognize my signature. I had forgotten that I had given such an affidavit. I did not furnish any bonds for the Park Ditch Company or in any way assist it to obtain such receipts in the action
with Hale. After the assignment to Hale & the execution
26 of the $8,000 agreement with him Mr. Kinna & myself with-
drew our notice requiring him to enforce the collection of his indebtedness against the ditch for which we were responsible."

Plaintiffs then called JOHN KINNA, who testified substantially as follows:

"I am one of the plaintiffs. I know of the execution of the contract. The proposition was made by the defendant to Mr. Ming & myself at Mr. Ming's office. The $8,000 contract was spoken of and the ditch receipts. Defendant said we were $2,572 short on the $8,000 contract. Defendant said if we would join with him and borrow the money of the 1st National Bank to pay this $2,572 he would

get the company to indemnify us by pledging us the water receipts for 1875 and also the Poznainsky and Chessman notes. Mr. Woolfolk, after being absent awhile, came back and said he had called the board together and that they had passed a resolution pledging the receipts to us as our security for signing the note; and he brought us the contract sued on, which was signed by himself, and upon this inducement we signed the note. The defendant said we
27 would get the water receipts for the following season, or a portion of them at least, which would pay the notes. There was the note we then signed for $2,572 and one held by Hale for taxes paid, amounting to about $600. He explained the redemption law to us and said that it gave us six months' possession of the ditch from the day of sale. I paid one-third of the amount of the notes, with interest."

And upon cross-examination the witness testified:

"Ming, Woolfolk, & myself were securities for the Park Ditch Company for $16,000 or $18,000, to R. S. Hale. Hale had agreed that if the Park Ditch Company would pay him that season $8,000 on the debt he would release us as such securities, or would buy in the ditch so as to release us if we sold it under our mortgage of indemnity. The Park Ditch Company had paid at the end of the water season of 1874 all of the $8,000 but this $2,572.10, and we borrowed this amount from the National Bank in order to pay the balance of the $8,000.00, and thus secure our release. If we had not paid this amount we would have had to pay the balance of the
28 $16,000 or $18,000, for which we were liable as security to Hale for the company. We were compelled to pay the $2,572.10 out of our own pockets or else have remained responsible for $11,000 or $12,000, the balance for which we were responsible as security to Hale. To a considerable extent I was induced to join in borrowing this money in order to be released from our liability to Hale as securities. I did not consider the Park Ditch Company solvent. I did not consider that the mortgage of indemnity to us from the company was any security to us for the indebtedness for which we were liable as its securities. I can't say, as Mr. Ming says, that I would have paid my part of the $2,572.10 in cash if no representations had been made by defendant. As I was not very flush in funds at that time, I should probably have borrowed my portion of the money to make up the $8,000 to Hale, if no representations had been made by Woolfolk. Of course my principal object in borrowing the $2,572.10 was to get released from the $16,000 or $18,000 security debt to Hale. I did not relinquish any security I held against the Park Ditch Company in consequence of the representations of Woolfolk or the paper sued on.
29 We still held our mortgage of indemnity, which was the only security we had. I was very glad to get the matter settled, and get out of the liability to Hale. I considered that in paying the $2,572.10 I was paying only what I had to pay, and was saved by doing so from paying a larger sum to Hale. I think the note for $2,572.10 was paid by us shortly after its execution. I do

not know what motive Woolfolk had in representing that the water receipts of 1875 had been pledged to us by the company. He owned the largest interest in the company, &, I suppose, wanted to hold on to it as long as possible. I don't know why he wanted to close it out to Hale in order to get released from his third of the liability to him."

The plaintiffs then called WILLIAM A. CHESSMAN, who testified substantially as follows:

"I know the parties to this action, and the note referred to in this agreement. I made a payment on the note I gave the Park Ditch Company in 1875. I made payments to the company and to the defendant that year. The note was given the company in August, 1873. In 1875 I paid the Park Ditch Company on account
30 of its note $229.12. The note to the company and the one to the defendant were for the purchase of certain ditches running to Helena Bar and Michigan Bar. The payment made to the company was in water furnished it by me, the amount of my bill for the same being credited upon my note. I made no payment to Woolfolk on my note to the Park Ditch Company, referred to in this action, after September 16, 1874. The note was claimed by R. S. Hale, and had always, I believe, been in his possession. Hale objected to Woolfolk giving me credit on the note to the Park Ditch Compaby for water furnished in 1875, and on that account Woolfolk paid me in money for the water after receiving payment in water for a note due himself against me. The $229.12 credited on the Park Ditch note in 1875 was paid to Mr. Hudnall as agent for Mr. Hale, and was for water furnished after Mr. Hale got possession of the ditch in 1875."

The plaintiffs also introduced one THOMAS P. NEWTON, who testified substantially as follows:

"In 1875 I was paid by the Park Ditch Company out of proceeds of sale of water for that year the sum of $——, which was
31 for a balance due me for about four years' services, and also for services rendered the company that year. About from $400 to $600 of it was for services rendered that year, and the balance was for services rendered prior to 1875. I drew what money I needed in 1872, and left the balance with the company at interest, 2% per month. All money due me was for services rendered the Park Ditch Company. Woolfolk became responsible to me for the money, as security for the company, and on this account I left my claim uncollected. I held notes for the amounts due me, which bore 2 per cent. per month. The notes were signed by Woolfolk, but I do not remember how they were signed, whether as security for the company or as guaranteeing the payment or otherwise.

The plaintiff then read in evidence the deposition of R. S. Hale, except the sixth interrogatory and the answer thereto, which is as follows, viz:

Deposition of R. S. Hale.

Int. 6. State whether, at the time of the production to you of this statement by Mr. Hauser, he made any propositions to you
32 on the behalf of Mr. Woolfolk as to the disposition of the money mentioned in said statement; if so, state what took place.

Objected to as irrelevant & incompetent.

Answer. There was a proposition made to me by Mr. Hauser to acknowledge the receipt of one-half of this amount and to pay it back to Mr. Woolfolk as compensation as attorney's fees for the Park Ditch Company, or something of that kind. I told Mr. Hauser that I did not consider the proposition as an honorable one, and that I thought Mr. Woolfolk wished to use me as a tool to take some advantage of the Park Ditch Company, & that I would not be a party to it.

The defendant objected to the reading of said 6th interrogatory and answer and to the whole thereof, and the court sustained such objection, and would not and did not permit the said interrogatory and answer to be read in evidence, to which ruling of the court the plaintiffs then and there duly excepted.

And the following interrogatories and answers, being por-
33 tions of the deposition of R. S. Hale, were read and admitted in evidence without objection, to wit:

Int. 1. What is your name, age, occupation, and place of residence?

Ans. Robert S. Hale; age, lawful; druggist; Helena, M. T.

Int. 2. State whether or not you had any conversations with the defendant, Woolfolk, in regard to the receipts of the Park Ditch for the sale of water for the mining season of A. D. 1875; &, if so, when, and how you came to have such conversations, when and where did they occur, & what was said by him.

Ans. I did not have any conversations with Woolfolk, but did with Sam. Hauser, who was acting at that time as a friend of both parties, who was carrying propositions from one to the other in regard to a settlement of our business matters and of my matters in regard to the Park Ditch.

Int. 3. Did Mr. Hauser at any time, and if so, when, produce and exhibit to you any statement in writing showing the amounts admitted to have been received by Woolfolk on account of net
34 receipts for sales of water of the Park Ditch Company for the year 1875, &, if so, where is that statement?

Ans. He did show me such a statement about the last of October, 1875. I do not know what has become of said statement. I looked for it among my papers, but could not find it. I searched diligently for said statement among all my papers, and failed to find it.

Int. 4. State in whose handwriting that paper was.

Ans. Col. Woolfolk's.

Int. 5. State the contents of said paper, as nearly as you can remember the same.

Ans. It was a statement of the net receipts of the Park Ditch for the year 1875, giving the receipts at $3,500.00, or thereabouts. It might have been more or less.

Cross-examination:

Int. 1. At the time that you speak of in answer to interrogatory No. 6, were propositions pending between yourself and defendant, Woolfolk, for a settlement of all disputes, suits, and controversies then existing between yourself, the Park Ditch Company, & defendant, Woolfolk?

35 Ans. There was.

Int. 2. Were not negotiations for that purpose carried on between the parties by S. T. Hauser?

Ans. Yes.

Int. 3. Was the statement detailed by you, as made by Mr. Hauser in answer to interrogatory 6, made by him pending these negotiations for compromise, and while making propositions to that end?

Ans. Yes.

Int. 4. Was not one of the suits then pending a suit wherein the right of defendant Woolfolk to enforce a first lien upon the Park Ditch for about $8,000 in water notes was involved?

Ans. There was such a suit.

Int. 7. Were you not claiming these receipts as justly belonging to you at the time of the conversation referred to between yourself and Hauser?

Ans. I was.

And the plaintiffs introduced and read in evidence the deposition of Felix Poznainsky, of which the following is a copy, to wit:

36 *Deposition of Felix Poznainsky.*

1. Please state your name, age, occupation, and place of residence.

Ans. May name is Felix Poznainsky; I am 45 years of age; am a miner, and reside at Butte City, Montana.

2. Where did you live & what was your occupation in the years 1874 & 1875?

Ans. I lived in Helena, Montana, and my occupation was that of a miner.

Ques. Had you a partner; &, if so, whom?

Ans. I had; Col. A. M. Woolfolk.

Q. In what particular locality and on what ground were you mining?

Ans. On Holmes Gulch, on the ground adjoining Guych below and about 1,000 feet above the road running from Helena to Jefferson City, M. T.

Q. Where and from whom did you obtain water to carry on your mining operations?

Ans. From the Park Ditch Company.

Q. Who was the managing agent of that ditch?

Ans. Col. A. M. Woolfolk.

Q. What did your company water bills amount to while mining in Holmes Gulch to Sept. 16, 1874?

37 Ans. In the year 1872, about $800.00; in the year 1873, about $800.00; in the year 1874, Sept. 16, about $1,200.00; in all about $2,800.00.

Q. What did your water bills amount to after Sept. 16, 1874?

Ans. I had no settlement, and do not know.

Q. By whom were your Co water bills paid?

Ans. Col. Woolfolk received all proceeds of the mine and paid all bills, except the year 1873, when I leased the ground and took the proceeds.

Interrogatory. Did you pay more than your portion of the bills?

(Obj. to by defendant.)

Ans. I do not know. I handled none of the money.

Int. By whom were your water bills paid after Sept. 16, 1874?

Ans. I do not know.

Int. How much did the defendant's portion of the bills amount to on the 16th day of September, 1874, and after that date?

Ans. About $1,400 to Sept. 16, 1874; after that date I do not know.

Int. Did defendant ever pay his part of said bill, and how?

38 Ans. I do not know.

Int. Did you ever pay your part of said $2,800?

Ans. Only in notes.

Int. Who was those notes executed to?

Ans. To Col. Woolfolk.

Int. For what amount?

Ans. One note was for $1,600 & one note for $600. I am not positive about the $1,600 note, but think that was the amount; it was between $1,300 & $1,600.

Int. State all you know about defendant's indebtedness for water.

Ans. I know nothing.

Int. How & to whom did you pay the amount paid by you?

Ans. I paid in notes & to Col. Woolfolk.

Int. What amount, all told, did you settle with Col. Woolfolk by notes?

Ans. About $2,200.

Int. Did you give any mortgage with said notes?

Ans. Yes; the notes were made a lien upon the mining ground as security for the payment of said notes.

Int. Did you give any other security?

Ans. I did not.

39 Q. To whom was said notes given and made payable?

Ans. To Col. A. M. Woolfolk.

Q. What property was pledged for the payment?

Ans. My interest in the Holmes Gulch mine.

Q. By whom was the said notes & mortgage cancelled?

Ans. I do not know.

Q. Was the said mortgage foreclosed?

Ans. There was a suit brought on the notes.

Q. Was the Holmes Gulch mine sold under judgment or decree, & who purchased it?

(Obj. to by def't.)

Ans. I do not know of my own knowledge.

Q. Did you make any payments on either of said notes?

Ans. I did not.

Q. Did you ever pay Woolfolk any money on any of this indebtedness?

Ans. I did not.

Cross-examination:

Q. What were the two notes given by you to Colonel Woolfolk for?

Ans. For expenses on the mine & water bills during the year 1873. I paid all the expenses except the water bills.

40 Q. How much of the two notes indebtedness was not water bill?

Ans. Between $800 & $1,000; I do not recollect.

Q. Did you owe Woolfolk any other money?

Ans. I owed him $50 & my half of patenting ground; in all, I think, near $500.00.

Q. How were these notes given—individually or otherwise?

Ans. They were given to A. M. Woolfolk.

Q. Did the proceeds of your mine pay the expenses of mining?

Ans. They did not.

Q. What indebtedness accrued during the year you run the mine?

Ans. I paid the full expenses except the water bill, for which I gave my note, but it did not pay expenses.

Q. Did that mine ever pay expenses?

Ans. In the year 1874 it did outside of the water bill. There was not enough surplus to pay the water bill.

Q. Did the mine ever pay expenses of mining except the year 1874?

Ans. No.

41 Q. Did you ever pay Woolfolk any of the indebtedness outside of water bills?

Ans. No; only in notes.

Q. With whom did you have the transaction concerning water?

Ans. Col. Woolfolk.

Q. Did you have the transaction with Col. Woolfolk, as manager of the Park Ditch Co., or personally?

Ans. I supposed him the manager of the Park Ditch Co.

Q. Do you know whether the usual mode of settling water bills was by notes given to Col. Woolfolk, as manager of the Park Ditch Co., or individually?

Ans. I do not know.

Q. Did you give any mortgage on your ground?

Ans. No; not to my knowledge.

Q. How did those notes read?
Ans. They were drawn as a lien on the ground.

Redirect examination:

Q. At the time you gave Col. Woolfolk those notes did you have any conversation with him? If so, state it fully.

42 Ans. He gave me to understand in a conversation with him at that that time the notes I gave him fully released me from any indebtedness to the Park Ditch Company, and that I owed him individually, and was released from any indebtedness for water bills to the Park Ditch Company.

Plaintiff also introduced in evidence the book of record of meetings of the Park Ditch Company, and read therefrom the following minutes of meetings, to wit:

Minutes on Pages 55, 57, 58, & 59 of Meetings of the Board of Trustees of the Park Ditch Company.

MAY 24, 1875.

"Whereas A. J. Davis, W. C. Gillette, and Sam. Schwab became sureties in the case of R. S. Hale *vs.* The Park Ditch Company *et al.*, to pay over the net receipts of the Park Ditch Co. to R. S. Hale if it should be finally decided that he was entitled thereto. It is therefore ordered that the net proceeds of said Park Ditch Co., consisting of the net proceeds of water sales on the Park & Nelson, and one-third of the net proceeds of the Tucker Extension be assigned to said Davis, Gillette, & Schwab in order to secure them against loss by reason of having executed such bond as aforesaid."

43 OCT. 20, 1875.

"Upon motion of Massena Bullard it was ordered that whereas a settlement is pending between A. M. Woolfolk, R. S. Hale, and this company, and said Hale desires in said settlement that this company shall execute to him a deed to all its right, title, and interest in & to the tools now used on the ditch, the chute at Chessman's reservoir, the slum dam below Turnley's mill on the park in Lewis & Clarke county; also all rights and privileges acquired under the agreement with W. A. Chessman; also the note of W. A. Chessman for $850.00 heretofore assigned to Messrs. Kinna & Ming, to no part of which property this company claims any right or title. It is therefore ordered that this company execute a deed, if required, to said property, but expressly disclaiming any title therein."

Massena Bullard offered the following, which was adopted:

"Whereas R. S. Hale has proposed to dismiss his action against this company for the proceeds of water sales for the year A. D. 1875, amounting to the sum of $3,450.00, as nearly as can be estimated, said action now pending in the supreme court of Montana
44 Territory on appeal from the decision of Hon. Decius S. Wade, judge of the third judicial district for said Territory; and whereas said Hale agrees to dismiss said suit only on the following

condition, viz: That A. M. Woolfolk shall cause to be dismissed all proceedings involving the payment of certain water notes executed to Johnson & Buskett by the Park Ditch Company and assigned by them to the said Woolfolk, said proceedings now pending also on appeal to the supreme court of the Territory aforesaid by T. P. Newton and A. M. Woolfolk from the decision of Hon. D. S. Wade, judge as aforesaid, said notes amounting, principal and interest, to the sum of about eight thousand dollars, and moreover demands that said notes be delivered up to him (Hale) to be cancelled, and that said Woolfolk cause to be dismissed and abandoned by T. P. Newton all appeals involving the right to the possession of the Park Ditch; and moreover, arbitrate the value of the Tucker Extension belonging to said Woolfolk, and demands moreover that said Woolfolk shall sell said extension to him at such appraised value, and moreover, sell and dispose of all other property belonging to said Woolfolk & connected with said ditch. And
45 whereas, moreover, the said Woolfolk has, at his own expense defended the right of this company to said receipts, and has furnished all necessary bonds for said company, and in addition to his own professional services has employed & paid counsel to defend said suit. Now, therefore, for the above considerations, this company does hereby promise and agree to and with the said Woolfolk that if he will accede to the terms of said Hale, this company will for this and the considerations aforesaid, relinquish to him one-half the amount of said receipts, to wit: One thousand seven hundred & twenty-five dollars, provided the said Woolfolk shall accept the same as full reimbursement & satisfaction for all his charges against said company by reason of the premises aforesaid, Col. Woolfolk being present accepted.

Whereas, there is now in the hands of A. J. Davis, W. C. Gillette, and Samuel Schwab, the sum of $1,725.00 belonging to this company, and whereas this company is indebted to Thomas P. Newton in the sum of $1,473.50, together with interest thereon at the rate of 2% per month from August 15, 1875, said amount being due
46 for work & labor done & performed by said Newton for the company, which indebtedness is evidenced by a promisory note dated Aug. 25, 1875, signed by trustees of this company, therefore it is ordered that said Davis, Gillette & Schawb pay to said Newton out of the sum in their hands as aforesaid, the said sum of $1,473.50 & and interest as aforesaid, and that the secretary deliver to said Davis, Gillette & Schawb a certified copy of this order, which shall be a voucher for the payment of said sum. Thomas P. Newton offered the following: "Whereas there is now in the hands of A. J. Davis, W. C. Gillette, and Sam Schawb, the sum of $174.89 belonging to this company; and whereas the company is indebted to Massena Bullard in large sums for professionai services done and performed by said Bullard as attorney for the company. Now, therefore, is is hereby ordered that said Davis, Gillette & Schawb pay to said Bullard the said sum of $174.89, and that the said sum be applied upon the indebtedness due from the company to said Bullard as aforesaid.

Adopted.

And thereupon, the plaintiffs having rested their case, the
47 defendant moved the court to withdraw from the jury the testimony of Thomas P. Newton, which motion was sustained by the court, and the court then & there withdrew said testimony from the consideration of the jury; to which said action of the court in sustaining said motion and in withdrawing said testimony from the jury the plaintiffs then and there duly excepted.

And thereupon defendant filed his motion for a nonsuit in said cause, which said motion is as follows, to wit:

Motion for Nonsuit.

MONTANA TERRITORY, *Lewis & Clarke County:*

In District Court, Third Judicial District.

JOHN KINNA & JOHN H. MING *vs.* ALEX. M. WOOLFOLK.

Now comes the defendant and moves the court for a nonsuit herein for the following reasons:

1. There is no sufficient case made to go to the jury.

2. There is no consideration shown for the execution of
48 the agreement sued on save that mentioned therein.

3. Because no damage has been shown by reason of the alleged misrepresentations.

4. Because it is shown that said plaintiffs, alike with defendant, were benefitted, and not injured, by the -2,572.10 paid.

5. That the parties were under a legal obligation to pay said $2,572.10, and gave up no securities, placed themselves in no worse condition, and were in no way injured by the payment thereof or misrepresentations, if any were made.

6. Because it shows that plaintiffs relied in part upon being released as sureties for about $16,000, as a part of the consideration for the payment of said $2,572.10, and not solely upon said defendant's representations.

7. Because all the evidence uncontradicted shows that the representations only induced them to sign the note to the First National Bank of Helena, and that they would have paid, and would have been compelled to pay, the amount for which it was given, and have not shown in what way they were damaged by executing said note more than if said money had been paid, as it would have
49 been done under their obligation to pay the same.

8. There is no damage or injury shown to have resulted from the representations of defendant.

9. The evidence shows that the money received on the bank note was at once paid to Hale, to whom the plaintiffs and defendant were under obligations to pay it, and that no right of action or injury could occur or did occur by reason of borrowing said money.

10. The evidence does not show that any proceeds or resources of the Park Ditch Company came into defendant's hands applicable to the payment of said amount over costs, charges, and expenses, after the execution of the agreement sued on, which fact is denied in the answer.

11. There is no evidence showing that the plaintiffs had not the means of knowledge of the character of resolution passed by the Park Ditch Company, or that none was passed, or that they had not access to and were not entitled to examine the records and proceedings of said Park Ditch Company.

50 J. H. SHOBER,
MASSENA BULLARD, &
E. W. TOOLE,
Att'ys for Defendant.

And the court, after argument of counsel, sustained said motion and granted a judgment of nonsuit in said cause; to which said ruling of the court the plaintiffs, by their counsel, then and there duly excepted, and pray that this their bill of exceptions may be signed, sealed, and made a part of the record, which is done accordingly this 30th day of May, A. D. 1881.

D. S. WADE, *Judge.*

And on the 12th day of May, A. D. 1881, judgment of nonsuit was duly entered in said cause, in words & figures following, to wit:

Judgment of Nonsuit.

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JOHN KINNA & JOHN H. MING *vs.* ALEX. M. WOOLFOLK.

51 This cause came regularly on for trial. The said parties appeared by their attorneys; a jury of twelve persons was duly empanelled & sworn to try said cause. Witnesses on the part of the plaintiffs were duly sworn and examined. Thereupon said cause came on to be heard upon defendant's motion for a nonsuit, and the same being argued and duly considered by the court, the court thereupon grants said motion, and orders that a judgment of nonsuit be entered herein accordingly. Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that the said defendant do have and recover of and from said plaintiffs his costs & disbursements incurred herein, taxed at the sum of $—.

Judgment entered May 12, 1881.

And on the 20th day of July, A. D. 1881, said plaintiffs filed in said cause their notice of appeal in words following, to wit:

52 *Notice of Appeal.*

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JOHN KINNA & JOHN H. MING *vs.* A. M. WOOLFOLK.

You will please take notice that the plaintiffs in the above-entitled action hereby appeal to the supreme court of this Territory from the judgment of nonsuit therein made & entered in the said district

court on the 12th day of May, A. D. 1881, in favor of the defendant in said action and against said plaintiffs, and from the whole thereof.

Dated this 20th day of June, A. D. 1881.

Yours, &c., CHUMASERO & CHADWICK & SANDERS & CULLEN,
Attorneys for Plaintiffs.

To the clerk of said district court, & to E. W. Toole, John H. Shober, & M. Bullard, att'ys for defendant.

"Endorsement:" We hereby admit service of the within notice, and waive service of a copy of the same this 18th day of July, A. D. 1881. Toole, Shober & Bullard for defendant. Alex. H. Beattie, clerk 3d dist. court, M. T.

53

And on the same day the said plaintiffs filed in said cause their undertaking on appeal in words & figures following, to wit:

Undertaking on Appeal.

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JOHN KINNA & JOHN H. MING *vs.* H. M. WOOLFOLK.

Whereas the plaintiffs in the above-entitled action are about to appeal to the supreme court of the Territory of Montana from a judgment of nonsuit made & entered against them in said action in the said district court in favor of the defendant in said action on the 12th day of May, A. D. 1881, for one hundred and fifty-eight & $\frac{50}{100}$ dollars costs of suit, and plaintiffs are desirous of staying the execution of said judgment: Now, therefore, in consideration of the premises and of such appeal, we, the undersigned householders of the county of Lewis & Clarke, M. T., do hereby, jointly and severally, undertake and promise on the part of the appellants that the said appellants will pay all damages & costs which may be awarded against them on the appeal or on a dismissal thereof not exceeding three hundred dollars, to which amount we acknowledge ourselves jointly and severally. And whereas the appellants are desirous of staying the execution of the said judgment so appealed from we do further, in consideration thereof & of the premises, jointly and severally undertake & promise and do acknowledge ourselves further jointly and severally bound in the further sum of three hundred & twenty-five dollars, being double the amount named in said judgment; that if the said judgment appealed from, or any part thereof, be affirmed or the appeal be dismissed, the appellants will pay the amount directed to be paid by the judgment or order, or the part of such amount as to which the same shall be affirmed, if affirmed only in part, and all damages & costs which may be awarded against the appellant upon the appeal.

54

Dated this 20th day of June, A. D. 1881.

W. H. GUTHRIE. [SEAL.]
FRANCIS POPE. [SEAL.]

55

(Here follows justification of sureties in due form.)

Clerk's Certificate.

In the District Court, Third Judicial District, Lewis & Clarke County, Montana Territory.

JOHN KINNA *et al. vs.* ALEX. M. WOOLFOLK.

I, A. H. Beattie, clerk of said district court, do hereby certify that the foregoing fifty-four pages, numbered from 1 to 54, inclusive, contain a true & correct transcript of certain pleadings, records, and proceedings filed, made, & had in the above-entitled action in said district court as the same appears on file and of record in my office.

In witness whereof I have hereunto set my hand & affixed my official seal, this 21st day of November, A. D. 1881.

[SEAL] A. H. BEATTIE, *Clerk.*

56 In the Supreme Court of Montana Territory. January Term, A. D. 1882.

JOHN KINNA & JOHN H. MING, Plaintiffs & Appellants,

vs.

ALEX. M. WOOLFOLK, Defendant & Respondent.

Be it remembered that in the present term of January, 1882, this cause came on to be heard in said supreme court on the transcript of the record of the district court in said cause, which was brought into said court by virtue of an appeal from the judgment of said district court agreeably to the statutes of said Territory and the rules of said supreme court in such case made and provided, and was argued by counsel.

Whereupon the court rendered its opinion and decision in said cause in writing, in the words & figures following, viz:

57 *Opinion of the Court by Wade, Chief Justice.*

In the Supreme Court of Montana Territory, January Term, A. D. 1882.

JOHN KINNA & JOHN H. MING, Plaintiffs & Appellants,

vs.

ALEX. M. WOOLFOLK, Defendant & Respondent.

Appeal from Third Jud. District, Lewis & Clarke County.

This is an appeal from a judgment of non-suit. The complaint alleges that on the 16th day of September, 1874, the plaintiffs and defendant entered into a contract in writing as follows:

"HELENA, *September* 16, 1874.

"Whereas John Kinna and John H. Ming have this day joined with me in borrowing the sum of ($2,572.10) twenty-five hundred and seventy-two and $\frac{10}{100}$ dollars, for the purpose of paying R. S. Hale the balance of eight thousand dollars due him under private

agreement with said Ming, Kinna, and Woolfolk, in order for
58 their release from certain notes executed by them to said Hale as security for the Park Ditch Company; and whereas the Park Ditch Company *and whereas the Park Ditch Company* has pledged the note of William Chessman to it and its claim against Felix Poznainsky, and any other demands due it, to the extent of repaying to the said Ming, Kinna, and Woolfolk the sum of $2,572.10, this day borrowed: Now, therefore, the said Woolfolk does hereby agree that if he should collect any of the above amounts, or shall from any resources whatever of the Park Ditch Company receive any other sums after deducting all costs, charges, & expenses, to apply the same in payment of said note; and also another note executed to R. S. Hale for taxes amounting to between six and seven hundred dollars, until said notes shall be fully paid; said payments to be made by the said Woolfolk after his return from the East next spring, and as soon thereafter as the amounts shall be received; but the said Woolfolk does not assume to pay said note only to the extent that he shall receive such amounts from the resources of the Park Ditch Co. as aforesaid.

"(Signed) A. M. WOOLFOLK."

Which agreement was then delivered to the plaintiffs.

59 And it is further alleged that as an inducement to the plaintiffs to join Woolfolk in borrowing said sum of money, and thereby procure the release of the plaintiffs and defendant from certain notes by them jointly executed, and to pay said Hale the sum mentioned in the agreement as due to Hale, the defendant, prior to, and at the time of, the receipt of the agreement by plaintiffs from the defendant, and the borrowing of the sum of $2,572.10 by them, stated and represented to the plaintiffs that the Park Ditch Company had passed a resolution in conformity with the recitals in the agreement, and relying upon the truth of the representations so made by the defendant, and solely induced thereby the plaintiffs did execute, together with the defendant, their promissory note for the sum of $2,572.10, and borrowed that sum, which was paid to Hale. And the plaintiffs further aver that, until long after the maturity of such note and the payment thereof by them, they were ignorant of the fact that the representations of the defendant were untrue, and that

60 no such resolution had been passed by the Park Ditch Company, which the defendant well knew, and he is, therefore, estopped from denying and proving that, in fact, no such resolution had been passed. The plaintiffs further aver that at the maturity of the note for $2,572.10 they paid two-thirds of the amount thereof, together with interest thereon, amounting to the sum of $1,810.14, and also paid two-thirds of the note mentioned in the agreement as due Hale for taxes, amounting to the sum of $445.50. The complaint further charges that the defendant returned from the East in May, 1875, entered into and took possession of the Ditch Company, and received for water sold therefrom for that season and from the Chessman note the sum of $3,500, which he should have applied in payment of the sums of money so paid by plaintiffs to Hale, and

that he failed so to do. Wherefore the plaintiffs demand judgment against him for the sum of $2,255.64.

The answer of defendant admits the execution of the agreement, but denies that there was any valuable consideration therefor, or any consideration except as in the agreement set forth, and specifically denies each and every other allegation contained in the
61 complaint. Upon the trial Ming, one of the plaintiffs, testified as follows: "I am one of the plaintiffs; I know the defendant, Alex. M. Woolfolk; he was the chief manager of the Park Ditch Company in the fall of 1874; I do not know that he was superintendent; Kinna & myself had a conversation with him on the day before, or on the same day of the date of the agreement mentioned in complaint; the conversation took place in my office in the rear of my store, in Helena, M. T.; defendant said that the balance of the $8000 which we owed Mr. Hale was due, and that the Ditch Company had not the money to pay it, and that he had a plan to propose, or a proposition to make, by which we could pay it without incurring any loss to ourselves; that if we would join him and give a note to the First National Bank, and borrow the money, he would get the company to turn over the receipts for water to be sold the following season, and any other sums they might be able to collect, to reimburse us in the amount, which was $2,572.10, and also a note which had been given for taxes of over $600; I told defendant that we could not get the receipts of the ditch if it was sold in
January under the mortgage, as it probably would be; he
62 then explained to us the provisions of the redemption law giving us six months to redeem in after the sale, and said that we could hold the ditch for that time, and that two months of it would be the best of the water season, in which he could collect sufficient money, after paying all expenses, to reimburse us and pay us back fully the sums mentioned. We agreed to do this if the company would pass a resolution pledging us the receipts for 1875 for this purpose. The defendant then left, but returned the same day and brought us the contract set forth in the complaint, signed by himself, and told us that the company had had a meeting and passed a resolution in accordance with his proposition and this agreement. Kinna was present at this time, and we then signed the note for $2,572.10, which note we afterwards paid, and also the note for $605 given for taxes. Kinna, Woolfolk, and myself each paid our part of these notes. Defendant returned in the spring of 1875, and, I think, took charge of the Park Ditch. The only knowledge I have
of the receipts of the Park Ditch for the year 1875 was con-
63 tained in a written proposition made by the defendant to Mr. R. S. Hale, which statement is now lost. I saw it once; it was in the handwriting of the defendant, with which I am well acquainted. In that writing it was stated that the net receipts of the ditch for the year 1875 was $3,500, or about that sum. At the time of borrowing the money I accepted the statement of the defendant that the company had passed the resolution pledging the water receipts of 1875 to us as true, and I relied upon them, and in consequence thereof executed the note. I did not learn that his state-

ment was false until the following season, when I ascertained that defendant had attempted to pledge the receipts of that season to Mr. Geo. W. Fox to secure a private indebtedness of his own. I accepted this representation, and was thereby induced to sign the note to raise the money.

On cross-examination the witness testified as follows:

"I do not remember the date when I discovered that no such resolution had been passed by the company, but it was upon the occasion named. At the time of giving our note to the bank we were
64 responsible to Mr. Hale for between $16,000 & $18,000. We had an agreement with him that if we paid him $8,000, of which this $2,572.00 was the balance, he would release us from all liability. At the time we made the agreement with Hale for the payment of $8,000, and our release from all liability to him, I regarded the Park Ditch Company as hopelessly insolvent. There was a mortgage of $6,000.00, and one of $3,600.00, to Hale upon the ditch, bearing interest at two per cent. per month from 1871 or 1872, the principal and interest upon the notes due Hale amounting to about $15,000, which was secured by mortgage upon the ditch. Mr. Hale held other notes of the company, amounting to between $16,000 & $18,000, for which Kinna, Woolfolk, and myself were security. We had no security, except an indemnity mortgage on the ditch, which was subordinate to the other mortgages to Hale upon the ditch which I have mentioned. This indebtedness, for which we were security, was bearing interest at the rate of two per cent. per month. In the fall of 1873 Mr. Kinna and myself were uneasy on account
65 of our large liability for the company, for which we felt we had no security. We notified Hale at that time that he must take steps at once to collect this indebtedness against the Park Ditch Company, and that if he did not do so we would no longer be responsible to him as sureties upon the notes. After we gave this notice there was a meeting of the trustees of the Ditch Company, to which I communicated a conversation which I had had with Hale, in which Hale proposed that if the company would assign the receipts of the season of 1874 to him, and we would, during said season, pay to him from the resources of the company the sum of $8,000 upon the indebtedness for which we were securities, and would then sell the Park Ditch under our indemnity mortgage, that Hale would bid at the sale of the ditch a sum sufficient to pay the amount for which we were security, and would discharge us from further liability to him thereon. Kinna and myself were in favor of this arrangement, and Woolfolk also consented to it. The trustees of the company then passed a resolution in accordance with that proposition, pledging the receipts of 1874 to Hale, and Kinna, Woolfolk, and myself
66 made an agreement with Hale with reference to the $8,000 payment and our release upon selling the ditch thereafter under our mortgage. My recollection is that Mr. Hudnall, as agent of Mr. Hale, was to collect the receipts under the agreement, which were all of the receipts of the Park Ditch, and one-third of the receipts of the Tucker Extension, the remaining two-thirds of the extension belonging to Woolfolk. During the year 1874 the total

net receipts of the Park Ditch Company only amounted to about $3,500. This amount was increased by the sum of about $2,000, which I had formerly collected as treasurer and accounted for at this time. The total still lacked $2,752.10 of paying the $8,000 to Hale in order to secure our release under the agreement. The receipts of the ditch in 1874 were not sufficient to pay the interest upon the company's indebtedness. We were bound to pay this $2,572.10, in order to secure our release from the indebtedness for which we were still security to Hale, and which amounted, after deducting the payments then made, to about $11,000 or $12,000.

67 We would have paid this $2,572.10 to Hale, as it was necessary to secure our release from our indebtedness to him, whether the receipts of 1875 had been assigned to us or not. We might not have borrowed the money if the statements of Woolfolk had not been made to us. If we had not borrowed the money we would simply have walked up to Mr. Hale and paid him the money instead of borrowing the amount. We would have been compelled to have paid him in some way, for he had our notes and we desired to be released. There was an agreement by the Park Ditch Company to make no defense to our action of foreclosure. I do not remember why the ditch was not sold until the 20th of January."

Kinna, plaintiff, testified as follows: "Ming, Woolfolk, and myself were securities for the Park Ditch Company for $16,000 or $18,000 to R. S. Hale. Hale had agreed that if the Park Ditch Company would pay him that season $8,000 on the debt he would release us as such sureties, or would buy in the ditch, so as to release us if we sold it under our mortgage of indemnity. The Park Ditch Company had paid at the end of the water season of 1874 all of the $8,000

68 but this $2,572.10, and we borrowed this amount from the National Bank in order to pay the balance of the $8,000, and thus secure our release. If we had not paid this amount we would have had to pay the balance of the $16,000, or $18,000, for which we were liable as security to Hale for the company. We were compelled to pay the $2,572.10 out of our own pockets, or else have remained responsible for $11,000 or $12,000, the balance for which we were responsible as security to Hale. To a considerable extent I was induced to join in borrowing this money in order to be released from our liability to Hale as sureties. I did not consider the Park Ditch Company solvent. I did not consider that the mortgage of indemnity to us from the company was any security to us for the indebtedness for which we were liable as its sureties. I can't say, as Mr. Ming says, that I would have paid my part of the $2,572.10 in cash if no representations had been made by defendant. As I was not very flush in funds at that time, I should probably have borrowed my portion of the money to make up the $8,000 to

69 Hale if no representations had been made by Woolfolk. Of course my principal object in borrowing the $2,572.10 was to get released from the $16,000 or $18,000 security debt to Hale. I did not relinquish any security I held against the Park Ditch Company in consequence of the representations of Woolfolk on the paper sued on. We still held our mortgage of indemnity, which was the

only security we held. I was very glad to get the matter settled, and get out of our liability to Hale. I considered that in paying the $2,572.10 I was paying what I had to pay, and was saved by doing so from paying a larger sum to Hale. I think the note for $2,572.10 was paid by us shortly after its execution. I do not know what motive Woolfolk had in making the representations that the water receipts of 1875 had been pledged to us by the company. He owned the largest interest in the company, and I suppose wanted to hold on to it as long as possible. I don't know why he wanted to close it out to Hale in order to get released from his third of the liability to him."

The foregoing was all the testimony in the case tending to show any consideration for the agreement sued on, and all in rela-
70 tion to any representations by defendant whereby plaintiffs were induced to enter into said agreemant. At the conclusion of the testimony the defendant moved for a non-suit for the reasons among others: First, that there was no sufficient case made to go to the jury; second, that there was no consideration shown for the execution of the agreement; third, because no damage had been shown by reason of the alleged misrepresentations; fourth, because the testimony shows that the plaintiffs alike with defendant were benefitted and not injured by the $2,572.10 paid, and fifth, that the parties were under a legal obligation to pay said $2,572.10 and gave up no securities, placed themselves in no worse condition, and were in no way injured by the payment thereof or by reason of misrepresentations, if any were made.

The court granted the motion for non-suit and this action is assigned as error.

1. Was there any consideration for the agreement? From the testimony it will be seen that in the fall of 1873, the Park Ditch Company was indebted to Hale in the sum of $16,000 to $18,000, for the payment of which the plaintiffs and defendant were sure-
71 ties. The company was insolvent. They, the plaintiffs and defendant, held no security that was of any value. They were uneasy and wished to be released from their liability. They notified Hale to proceed against the company at once or they would be no longer responsible to him as sureties upon the notes he held against the company. Hale proposed that if the company would assign the receipts of the season of 1874 to him and the plaintiffs and defendant would make up to him what such receipts fell short of making the sum of $8,000 upon the indebtedness for which they were sureties, then upon a sale of the ditch upon their indemnity mortgage Hale would bid at the sale a sum sufficient to pay the amount for which they were sureties and discharge them from any further liability to him. This arrangement was consummated. The receipts of the ditch for 1874 were assigned to Hale, and the plaintiffs and defendant agreed to pay to him what such receipts fall short of making the sum of $8,000. This is the agreement referred to in the contract sued on. It will be observed that this $8,000 was a payment upon the indebtedness for which the plaintiffs & de-

fendant were sureties, so that in whatever part of said
72 $8,000, they paid, they were simply discharging a legal obligation & liability that was upon them before the contract mentioned in the complaint had been made. Before said contract was made, the $2,572.10 named therein might have been collected from them, and in paying that sum they were paying a debt that they could not escape paying, and that the contract did not in any manner affect. In entering into this agreement with Hale to make up what the water receipts for 1874 fell short of making the sum of $8,000, they were contracting to pay so much on an indebtedness they already owed, and by the payment of which they made good their mortgage and relieved themselves from an indebtedness of $16,000 to $18,000. In borrowing this $2,572.10 and making this payment, the same was as much for the benefit of the plaintiffs as the defendant, and all the basis that the contract sued on has is the fact that they borrowed that sum for the purpose of making such payment. The promise of the defendant to refund the money so borrowed was a mere naked promise without consideration.

The contract which is made the basis of this action and
73 which expresses the consideration upon which plaintiffs rely is as follows, to wit: "Whereas, John Kinna and John H. Ming, have this day joined with me in borrowing the sum of $2,572.10 for the purpose of paying R. S. Hale the balance of $8,000, due him under private agreement with said Ming, Kinna & Woolfolk, in order for their release from certain notes executed by them to said Hale as security for the Park Ditch Company." There is nothing in this but that three equal debtors joined together to borrow and did borrow money to pay a debt for which they were severally and jointly liable. It is not possible that so far there is any promise of or liability for Woolfolk to repay to Kinna and Ming their share of the money so borrowed and paid on their joint indebtedness. The contract further recites: "And whereas the Park Ditch Company has pledged the note of William Chessman to it and its claim against Felix Poznainsky, and any other demands due it to the extent of repaying the said Kinna, Ming & Woolfolk, the sum of $2,572.10 this day borrowed." This is vague and uncertain, but if anything can be ascertained in favor of plaintiffs it is that the Park Ditch Company had theretofore pledged
74 to Kinna, Ming & Woolfolk the notes therein mentioned to repay them the sum of $2,572.10 that day borrowed. But it is not seen, & cannot be seen thus far, wherein Woolfolk promised to pay anything to Kinna & Ming. The contract continues: "Now, therefore, the said Woolfolk does hereby agree if he shall collect any of the above amounts, or shall from any resources of the Park Ditch Company receive any other sums, after deducting all costs, charges, and expenses, to apply the same in payment of said note, and also another note executed to R. S. Hale for taxes, amounting to between six & seven hundred dollars, until said notes shall be fully paid."

It is apparent from plaintiffs' complaint that the note of $600 to Hale was paid off by Kinna, Ming and Woolfolk, but it is said "in

payment of said note." What note? It could not be a note of Woolfolk to Kinna & Ming or they would proffer it or show cause of its absence. When the contract says "said note" and also another note executed to R. S. Hale, the legal intendment is that both notes were the property of Hale, but this cannot be so or
75 these plaintiffs would not sue to recover on it without so stating in their complaint. From this examination of the latter clause of the contract it is again seen conclusively that the whole matter was without consideration and void. And if the defendant did promise to pay "said note" and another note, in what does the consideration consist? None is mentioned in the writing. It was a mere naked promise for the payment of an uncertain amount out of uncertain proceeds to uncertain parties, in an uncertain manner and at an uncertain time, without consideration in law and void.

2. Appellants in their brief rely upon the fact that "this case has once before occupied the attention of this court, (sec. 3 Mont. R., 380,) and this identical contract was then subjected to judicial consideration and interpretation. It must be a little singular, to say the least of it, if this contract was in fact without consideration, that this court upon that appeal should have overlooked the matter, and remanded a case which was based upon a mere barren agree-
76 ment in writing, to the district court for a new trial."

Appellants further say:

"Although there is nothing expressly said in the opinion of the court concerning the sufficiency of the consideration, it was a matter within the issues, and which the court must have found in favor of appellants."

The matter of the consideration could not have been an issue in this case before, for whatever were the real facts in the case the learned judge who delivered the opinion in the case, after setting out the contract says: "Said Ming & Kinna brought this action to recover from said Woolfolk the sums that are mentioned in the contract and were paid by them to Hale." Again the opinion states, on page 385, "It appears that the appellants and respondent borrowed of R. S. Hale the sum of $2,572.10," &c.

It is not necessary to proceed further in a comparison of the cases to see that a different case would exist if the money had, in fact, been borrowed from Hale and respondent had agreed to pay the note which was given as the evidence of the debt. This is not the case.

The judgment is affirmed with costs.

77 Thereupon judgment on appeal was entered in conformity with said opinion as follows, viz:

Judgment on Appeal.

In the Supreme Court, Montana Territory. January Term, A. D. 1882.

JOHN KINNA & JOHN H. MING *vs.* ALEX. M. WOOLFOLK.

This cause came regularly on to be heard before the court on the transcript of the record of the district court therein, which was

brought into the supreme court of Montana Territory by virtue of an appeal agreeably to the statutes of said Territory, and the rules of said court in such case made and provided, and was argued by counsel.

Whereupon in the present term of January, A. D. 1882, it is ordered and adjudged by this court that the judgment of the court below be, and the same is hereby, affirmed with costs. And it is further order[ed] that the defendant and respondent, Alex. M. Woolfolk recover against said plaintiffs & respondents, John Kinna & John H. Ming — dollars for his costs herein expended and
78 have execution therefor.

2d February, 1882.

And afterwards, to wit, on the 20th day of March, 1882, said plaintiffs & appellants filed hereint heir writ of error to remove said cause to the Supreme Court of the United States to reverse the said judgment of the supreme court of Montana Territory, of which said writ of error in words & figures the following is a copy, viz:

79 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the judges of the supreme court of the Territory of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of Montana Territory before you, or some of you, in a cause between John H. Ming and John Kinna, plaintiffs and appellants, and Alexander M. Woolfolk, defendant and respondent, a manifest error hath happened, to the great damage of the said John H. Ming and John Kinna, as by their complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in that behalf, do command you that if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, together with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next,
80 in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness Honorable Morrison R. Waite, Chief Justice of said Supreme Court, this 20th day of March, A. D. 1882.

ISAAC R. ALDEN,
Clerk of the Supreme Court of Montana Territory.

Allowed by—
DECIUS S. WADE,
Chief Justice.

And on the 24th day of March, A. D. 1882, the said appellants filed herein their citation, of which, with the endorsements thereon, the following is a copy, to wit:

81 *Citation.*

UNITED STATES OF AMERICA, *ss.:*

In Supreme Court, Montana Territory.

JOHN H. MING & JOHN KINNA, Plaintiffs in Error,
vs.
ALEX. M. WOOLFOLK, Defendant in Error.

To Alexander M. Woolfolk, defendant in error, Greeting:

Yo are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of the Territory of Montana, wherein John H. Ming and John Kinna are plaintiffs and you are the defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness Honorable Decius S. Wade, chief justice of the supreme court of Montana Territory, this 20th day of March, A. D. 1882.

DECIUS S. WADE,
Chief Justice.

82 Endorsement: "I hereby certify and return that at Helena, Mont., this 23d day of March, 1882, I served the within citation on the within-named Alexander M. Woolfolk personally by exhibiting the same to him, and at the same time delivering to and leaving with him a true copy thereof. M'ch 23, 1882. Alex. C. Botkin, U. S. marshal, by W. A. Rumsey, deputy. Service, 2.00; mileage, 6; $2.06.

And on the 28th day of March, A. D. 1882, plaintiffs filed herein their undertaking to accompany said writ of error & citation, of which the following is a copy, to wit:

Undertaking.

In the Supreme Court of the United States.

JOHN H. MING & JOHN KINNA, Plaintiffs in Error,
vs.
ALEXANDER M. WOOLFOLK, Defendant in Error.

Know all men by these presents that we, Isaac Greenhood and Francis Pope, of Lewis and Clark county, Montana Territory,
83 are held and firmly bound unto Alexander M. Woolfolk, of the same place, defendant in error, in the sum of five hundred dollars, lawful money of the United States of America, to be paid to the said Alexander M. Woolfolk, or to his heirs, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, and each of them, severally and jointly, firmly by these presents.

Sealed with our seals. Dated this 28th day of March, A. D. 1882.

Whereas the above-named John H. Ming and John Kinna, plaintiffs in error, have sued out a writ of error to remove the above-entitled cause from the supreme court of Montana Territory to the Supreme Court of the United States to reverse the judgment rendered in said cause by the supreme court of Montana Territory, on the second day of February, A. D 1882, in favor of the said defendant and against said plaintiffs in error: Now, therefore, the condition of this obligation is, that if the above-named plaintiffs in error, John H. Ming and John Kinna, shall prosecute their said
84 writ of error to effect and answer all damages and costs which may be awarded against them if they shall fail to make good their plea, then this obligation to be void; otherwise to be and continue in full force and virtue.

ISAAC GREENHOOD. [SEAL.]
FRANCIS POPE. [SEAL.]

Approved.
D. S. WADE,
Chief Justice.

85 In the Supreme Court, Montana Territory.

JOHN KINNA & JOHN H. MING, Plaintiffs in Error,
vs.
ALEX. M. WOOLFOLK, Defendant in Error.

I, Isaac R. Alden, clerk of the supreme court of Montana Territory, do hereby certify that the foregoing eighty-four pages, numbered from 1 to 84, inclusive, contain a full, true, & correct transcript of certain pleadings, records, & proceedings filed, made and had in said court in the above-entitled cause, as the same appear of record & on file in my office.

In witness whereof I have hereunto set my hand & affixed my official seal, this 16th day of September, 1882.

[Seal Supreme Court Montana Territory.]

ISAAC R. ALDEN, *Clerk.*

Endorsed on cover: Montana Territory sup. court. No. 116. John H. Ming and John Kinna, plaintiffs in error, *vs.* Alexander M. Woolfolk. Filed 14th October, 1882.

116-599

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 116.

JOHN H. MING AND JOHN KINNA,
PLAINTIFFS IN ERROR,

vs.

ALEXANDER M. WOOLFOLK.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR PLAINTIFFS IN ERROR.

M. F. MORRIS,
L. M. SAUNDERS,
Of Counsel for Plaintiffs in Error.

JUDD & DETWEILER, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1885.

No. 116.

JOHN H. MING AND JOHN KINNA,
PLAINTIFFS IN ERROR,

vs.

ALEXANDER M. WOOLFOLK.

In Error to the Supreme Court of the Territory of Montana.

BRIEF FOR PLAINTIFFS IN ERROR.

I.

STATEMENT OF CASE.

The Park Ditch Company of Helena, Montana, was indebted to one R. S. Hale in the sum of $16,000 or $18,000, which was partly secured by mortgage and partly by the promissory notes of the company guaranteed by Kinna, Ming, and Woolfolk, of whom the latter was manager or superin-

tendent of the company. Hale agreed to release the guarantors if they would pay him $2,572.10. Woolfolk induced Kinna and Ming to join him in the execution of a note to raise the money from the First National Bank, and agreed with him that the note should be paid from any collections that should be made from the resources of the company.

The note was made, and the money was paid to Hale. Subsequently Kinna and Ming paid their share of the note, and Woolfolk never made any application to it of any sums collected by him on account of the company, though there is testimony to show that he collected $3,500.

It appeared upon the cross-examination of the plaintiff that they would have paid the money to Hale whether the note had been made or not, and that they had not in fact been injured by Woolfolk's representation set forth in his written agreement (Record, p. 1), and which seems to have been at variance with truth, that the company had pledged certain assets to the payment of the proposed note.

The district court held that the contract was without consideration, and nonsuited the plaintiffs; and the supreme court of the Territory affirmed the judgment. And the writ of error here is sued out to reverse this judgment.

II.

ASSIGNMENT OF ERRORS.

1. The court below erred in holding that the contract in question was without consideration.

2. The court below erred in ruling that the plaintiffs could not recover upon said contract.

2. The court below erred in directing a nonsuit against the plaintiffs.

III.

BRIEF OF ARGUMENT.

It is respectfully submitted that the Territorial courts misunderstood the purport of this suit and of the contract on which it was based. The action was treated as an action of deceit for fraudulent misrepresentations, and it was argued that, as the misrepresentations worked no actual injury and the plaintiffs would have done what they did anyhow, therefore they were not injured, and there was no consideration moving to the defendant on which he could be held. Besides the fact that the allegation of want of consideration in a solemn contract in writing is not one that should be favored the Territorial courts seem to have forgotten that the plaintiffs were merely guarantors of the Ditch Company's indebtedness; that the defendant was a large stockholder in the company and its general manager, and that his conduct complained of was his failure to apply to the reimbursement of the plaintiffs as guarantors the moneys collected by him on account of the company, according to his agreement so to do. The plaintiffs had the right to be reimbursed, and the defendant represented or misrepresented that the company had pledged certain assets towards such reimbursement, and that he would so apply them when they came into his hands. They came into his hands, and he did not so apply them; hence this suit.

There is some testimony to show that the assets in question had been otherwise pledged; but it does not seem that this should affect the case at all. If money came into the hands of the defendant which he might have used for the payment of the promissory note in question—and that was a question to be determined on the evidence by the jury—his promise to the plaintiffs so to use them was based upon abundant consideration, the duty of the defendant and of his company to save the plaintiffs harmless against the lia-

bility which they had incurred for the benefit of the company and at the request of the defendant.

It does not appear what the defendant did with the funds that came into his hands, and it should have been left to the jury to determine, under the instructions of the court, whether he had received any funds applicable to the relief of the plaintiffs from their liability.

It is submitted, therefore, that the Territorial court was wrong in taking this case entirely from the jury.

M. F. Morris,

L. M. Saunders,

Of Counsel for Plaintiffs in Error.

116-699

Office Supreme Court U. S.
FILED.
DEC 7 1885
JAMES H. McKENNEY.
CLERK.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

No. 116.

JOHN H. MING AND JOHN KINNA, PLAINTIFFS IN ERROR,

vs.

ALEXANDER M. WOOLFOLK, DEFENDANT.

BRIEF OF DEFENDANT.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1885.

JOHN H. MING AND JOHN KINNA, PLAINTIFFS IN ERROR,

vs.

ALEXANDER M. WOOLFOLK, DEFENDANT.

DEFENDANT'S BRIEF.

Had the original as well as the amended pleadings been embodied in the record the true issues between the parties would more clearly appear. The confusion as to the issues is also greatly increased by the introduction into the record of a Replication filed nearly three years before the amended answer, to which it now appears as a reply. (See record, bottom of p. 5 and p. 4, Sec. 2.)

The true facts, however, are sufficiently indicated by the record to show the utterly unconscionable character of the action which is sought to be maintained. They are as follows:

STATEMENT.

John H. Ming and John Kinna, the plaintiffs, as well as the defendant, Woolfolk, were owners of the principal stock of the Park Ditch Company which was a corporation. (See answer, Record p. 4, Sec. 11.)

The company became insolvent and left Ming, Kinna and Woolfolk jointly responsible upon its notes to R. S. Hale, for between $16,000 and $18,000, bearing two per cent. per month. The plaintiffs and defendant had no indemnity to protect them against this large liability except a mortgage upon the Ditch, but this was subordinate to other mortgages held by Hale, to the amount of $15,000 bearing two per cent. per month, and both the plaintiffs confess, on cross examination, that they did not consider that their mortgage was any security at all. (Record, p. 8, Sec. 20-21 and p. 11, Sec. 27-28.)

The plaintiffs became uneasy on account of this liability and served a notice upon Hale, that he must take steps at once to collect his indebtedness against the Ditch Company and that if he did not do so they would no longer be responsible as securities upon the notes. (Record, Sec. 21.) But at a subsequent meeting of the Park Ditch Trustees, Ming communicated to the Board a proposition of Hale, that, if the water receipts of 1874 were assigned to him, and he received that season from the resources of the Company $8,000, he (Hale) would buy in the ditch, if sold under the mortgage of indemnity to Ming, Kinna and Woolfolk so as to release them from liability. Ming and Kinna favored the proposition and Woolfolk acceded to it. (Record, Sec. 21-22.) As the defendant was the largest owner of the Company stock, while his liability as security was only equal to that of each of the plaintiffs, he was of course the principal sufferer from the arrangement. Kinna concedes this on cross-examination. (Record, Sec. 29.)

It was not, however, until after the ratification of this agreement that Ming and Kinna withdrew their notice to Hale to proceed against the Ditch Company, and this explains the reason for defendant's compulsory assent to the arrangement. (Record, Sec. 26.)

The season of 1874 arrived, and Hale collected the water receipts under the assignment. All parties were thus enabled to see how small they really were.

Ming says on cross-examination: "During the year 1874, the total net receipts of the Park Ditch Company only amounted to about $3,500. This amount was increased by about the sum of $2,000, which I had formerly collected as treasurer and accounted for at this time. The total still lacked $2,572.10 of paying the $8,000 to Hale in order to secure our release under the agreement. The receipts of the ditch in 1874 were not sufficient to pay the interest upon the Company's indebtedness. We were bound to pay this $2,572.10 in order to secure our release from the indebtedness for which we were still security to Hale, and which amounted, after deducting the payments then made, to about $11,000 or $12,000. We would have paid this $2,572.10 to Hale, as it was necessary to secure our release from our indebtedness to him whether the receipts of 1875 had been assigned to us or not." (Record, p. 9, Sec. 23.)

These facts, wrung from both the plaintiffs on cross-examination, showed how utterly fictitious and false were the allegations of their complaint. Instead of being deceived by the defendant into borrowing $2,572.10, as they allege in their complaint, they were forced to borrow the money in order to carry out their arrangement with Hale which they themselves had made, and to which the defendant had been forced to submit by the exigencies of the situation.

The pleadings and evidence show that there was but

ONE ISSUE

between the plaintiffs and defendant, and that was as to the water receipts for 1875. The plaintiffs while professedly bringing their action upon the instrument executed by defendant, endeavor to

enlarge its terms by parol, and base their action upon the parol enlargement. The instrument recites that the Park Ditch Company had pledged to Ming, Kinna and Woolfolk "the note of William Chessman to it and its claim against Felix Poznainsky, and any other demands due it."

The plaintiffs claim that in addition to these recitals of what had been assigned, the defendant at the time of the execution of the instrument, falsely represented that the Park Ditch Company had also pledged to them the water receipts for the following year (1875) and that they were thus induced to borrow the $2,572.10 to pay to Hale. This is denied by defendant, and is the only issue in the case. There is no dispute but that the Park Ditch Company did in fact assign to plaintiffs and defendant "the note of William Chessman to it and its claim against Felix Poznainsky, and any other demands due it" on Sept. 16. 1874, the date of the instrument, but the defendant denies that the water receipts for the following year (1875) were assigned by the Company, or that he ever represented that they had been so assigned.

That the above was the only issue, will be apparent from the pleadings and evidence. The answer does not deny the averment that defendant had represented that the Chessman note and Poznainsky claim had been assigned, but does deny the alleged representations as to the water receipts of 1875. (Record, p. 4, Sec. 10-11.) It denies also that any such resolution pledging the water receipts for 1875 had ever been passed by the Park Ditch Company, or that defendant is estopped from proving that such is the case. (Record, p. 5, Sec. 11.)

The complaint charges in general terms the collection of the Chessman note and Poznainsky claim which is denied in the answer; but on the trial it will be observed that the plaintiffs confine themselves exclusively to the alleged misrepresentations by defendant, that the water receipts for 1875 had been assigned to them. Neither Ming nor Kinna make any charge or even intimation on the trial, that the defendant had collected the Chessman note, the Poznainsky claim or any other of the sums referred to in the instrument as pledged to them. (Record, p. 9-10-11.)

Ming charges in his evidence that he borrowed the $2,572.10 to pay Hale because the defendant convinced him by explaining the redemption law that they would hold the ditch for six months after the sale, and would get the water receipts for two months in the spring, the best of the season. (Record, p. 7, Sec. 16-17.) Says Ming: "We agreed to do this (i. e. borrow the money) *if the Company would pass a resolution pledging us the receipts of 1875 for this purpose.* (The italics are ours in all cases where they occur.) The defendant then left, but returned the same day and brought us this contract (referring to instrument set up in the complaint) signed by himself, and told us the Company had had a meeting and passed a resolution in accordance with his proposition and this agreement. Kinna was present at this time and we then signed the note for $2,572.10." (Record, p. 7, Sec. 17.)

To the same effect is the testimony of the co-plaintiff, John Kinna. There is no attempt to claim that the defendant had collected any of the amounts represented in the instrument sued on as pledged by the Park Ditch Company, but, like Ming, he rests the entire case upon the charge of misrepresentation in regard to the water receipts for 1875. He says:

"Defendant said we were $2,572.10 short on the $8,000 contract. Defendant said if we would join with him and borrow the money of the First National Bank to pay this $2,572.10 he would get the Company to indemnify us by pledging *the water receipts of 1875* and also the Poznainsky and Chessman notes. Mr. Woolfolk after being absent awhile came back and said he had called the Board together and that they had passed a resolution *pledging the receipts to us as our security for signing the note*, and he brought us the contract sued on which was signed by himself and upon this inducement we signed the note." (Record, Sec. 26.)

Thus it will be seen that both Ming and Kinna base their entire cause of action upon the alleged misrepresentation with regard to the water receipts of 1875. The testimony of both Chessman and Poznainsky was taken in the case, and a glance at this will reveal why so little stress at the trial was laid upon

THE CHESSMAN NOTE AND POZNAINSKY CLAIM.

Chessman expressly states that after the date of the instrument sued on—Sept. 16, 1874—he paid nothing to Woolfolk on his note to the Park Ditch Company as it was claimed by Hale, and that the only payment made on it after that date was to "Mr. Hudnell, as agent for Mr. Hale." (Record, p. 12, Sec. 30.

As to the claim against Poznainsky the plaintiffs introduced his deposition in the case but made no effort to show by introducing the record of the assignment what the claim really was that was assigned by the Park Ditch Company and is referred to in the instrument sued on.

Poznainsky in his deposition refers to a series of notes that he executed to the defendant during a period of years, prior to Sept. 16, 1874, and which he confesses that he never paid. But whatever the claim was, it appears from the instrument to have been a claim against Poznainsky that was assigned, and not one against the defendant. One thing, however, certainly and plainly appears from Poznainsky's deposition, and that is, that he never paid any of his indebtedness either to the defendant or the Park Ditch Company, and that he never even had a settlement after Sept. 16, 1874, the date of the instrument. (Record, p. 15, Sec. 37; also Sec. 38-39.)

So far then as the claim against Felix Poznainsky is concerned, its status must have remained the same after the date of the instrument sued on as before.

As no effort was made to show the collection by defendant of "any other demands due" on Sept. 16, 1874, it is evident that the plaintiffs had no cause of action against defendant unless for

THE WATER RECEIPTS OF 1875.

A glance at the record will be sufficient to show the preposterous character of this claim. That these water receipts could not have been contemplated on the date of the instrument sued on, or in any manner have influenced the action of plaintiffs, is evident from the following considerations:

1st. At that date it was expected to sell out the ditch under the mortgage of indemnity to plaintiffs and defendant, and Hale had agreed to buy it in. The $2,572.10 that day borrowed, was to consummate the arrangement with Hale for foreclosing the ditch. The Park Ditch Company had agreed to make no defense to the action of foreclosure, and the plaintiffs and defendant had agreed in writing to foreclose their mortgage at the beginning of the November term of Court. Ming concedes on cross-examination that if these agreements had been carried out there would have been no water receipts prior to the expiration of the six months redemption unless some accident delayed the sale. No water receipts in 1875 could have been contemplated then at the date of the instrument. All the above facts appear in Sec. 24 and 25 of Record.

2nd. These water receipts were only recovered after long litigation with Hale, in which the plaintiffs not only left the defendant to bear the brunt of the battle, but plaintiff Ming confesses to having co-operated with Hale, and furnished him an affidavit in such action to enable him to recover these receipts. (See end of Sec. 25.) This was in May, 1875, and he swears in his complaint that at that very time, and until June 9, 1877, he actually believed that these receipts were pledged to himself and Kinna, and had acted on such belief! (Record, Sec. 5.)

3d. The portion of the records of the Park Ditch Company that were introduced in evidence by plaintiffs, show that these water receipts were only finally surrendered by Hale as the result of a compromise in which the defendant, Woolfolk was required to surrender interests of much greater magnitude—to-wit, water notes amounting to $8,000, besides other valuable rights. Certainly such compromise could not have been contemplated at the date of instrument, more than a year before.

This Record recites that the defendant "has at his own expense defended the right of this Company to said receipts, and has furnished all necessary bonds for said Company, and in addition to his own professional services, has employed and paid counsel to defend said suit." It is only after the battle has been fought and won that the plaintiffs come over from the camp of the enemy, and attempt with the aid of their old ally, Hale, to despoil the defendant of the fruits of hard-earned victory. (See Record, p. 17 and 18, Sec. 44 and 45.)

4th. This claim of plaintiffs to the water receipts of 1875, is not only in violation of every fact and circumstance in the case, but can only be maintained by varying, altering and contradicting the very

instrument on which they profess to sue. That instrument recites that the Park Ditch Company had pledged "the note of William Chessman to it and its claim against Felix Poznainsky, and *any other demands due it.*" The water receipts for 1875 could not be embraced among "demands due" on Sept. 16 1874, the date of the instrument. Seven years after the date of the instrument, the plaintiffs swear to verbal representations which they claim were made to them by the defendant at the time of its execution, although such reported representations are contradicted by the language of the instrument itself, and by every known fact in the case.

IN CONCLUSION

the defendant respectfully submits that when all falsehood and misrepresentation has been brushed away, the instrument sued on is unambiguous and clearly interprets itself. The Park Ditch Company, an insolvent corporation, was about to be sold out under execution. It had agreed to make no defense, but let the law take its course. As one of its last corporate acts, it pledged to plaintiffs and defendant the Chessman and Poznainsky claims, and "any other demands due it," in consideration of their borrowing $2,572.10 to pay to R. S. Hale as its securities. Presumably this pledge by the Company of all demands due it, embraced all of its resources, as it was to be sold out immediately under execution, and had nothing to expect in future. This was evidently the view taken by defendant in drawing the instrument sued on; for while clearly basing the instrument upon the assignment of the Company to plaintiffs and himself, he treats the pledge of all demands due the Company, as synonymous with all of its resources.

As the defendant was the attorney for the Company, it was probable that if any of the resources pledged were ever collected, it would be done through him; and the instrument sued on simply binds him to apply these resources if they come into his hands in payment of the notes which plaintiff and himself had jointly executed on account of their liabilities for the Company. This is all that there is in the instrument.

The defendant respectfully submits that this instrument, executed by him, briefly, but clearly and accurately recites all the important facts in the case, and plainly fixes the measure of his liability. He plants himself therefore squarely upon it, and denies the right of the plaintiffs to make a new and different case against him by injecting into the instrument by parol evidence, other clauses in conflict with its provosions.

The instrument says:

"HELENA, SEPT. 16, 1874.

"Whereas John Kinna and John H. Ming have this day joined with me in borrowing the sum of $2,572:10, for the purpose of paying R. S. Hale the balance of $8,000 due him under private agreement with said Ming, Kinna and Woolfolk, *in order for their release from certain notes executed by them to said Hale as security for the Park*

Ditch Company, and whereas the Park Ditch Company has pledged the note of William Chessman to it and its claim against Felix Poznainsky and *any other demands due it* to the extent of repaying to said Ming, Kinna and Woolfolk the sum of $2,572:10 this day borrowed; now, therefore the said Woolfolk does hereby agree etc., etc."

By these recitals the defendant clearly showed his purpose to merely carry out the pledges of the Park Ditch Company, which he mentions as the inducement for executing the instrument. As if to guard even more carefully against any assumption of personal liability, the instrument concludes as follows: "But the said Woolfolk does not assume to pay said note only to the extent that he shall receive said amounts from the resources of the Park Ditch Company as aforesaid." (Record Sec. 3.)

The defendant respectfully submits that the cause of action against him herein, is a fictitious one throughout, and has no foundation either in the instrument on which the action is brought, or in any fact or circumstance in the case. In fact such an action can find no explanation save in the confession of unfriendliness to the defendant. (Record p. 9, bottom.) As to the cause of that unfriendliness it is needless to say more than that the Record shows that the plaintiff Ming had formerly been the treasurer of this corporation which became insolvent, and that the defendant was its attorney. Ming briefly acknowledges without comment that only the year before he had accounted for $2,000 which he "had formerly collected as treasurer." (Record Sec. 23.)

This is a clear case of the combination of two men against one, in which the attempt is made to make up by numbers for the lack of merit. But if such an action can be maintained, then it is respectfully submitted that it would be useless for a single defendant to hedge himself about with a written instrument, in the vain hope of thus shielding himself against the attacks of unscrupulous combinations.

The defendant in conclusion would call attention to the points made in his motion for non-suit which he claims are well taken throughout. (See Record, p. 19, Sec. 48-49.)

1st. This was an action of deceit in which plaintiffs claim to have been misled by the false representations of defendant to the effect that the water receipts of 1875 had been pledged to them by the Park Ditch Company, and were thereby induced to borrow $2,572.10 and pay the same to R. S. Hale.

But to maintain such an action, all the authorities agree that they must have been influenced by the false representations, to do something to their injury which they would not otherwise have done. But both of the plaintiffs admit on cross-examination that they would have paid Hale the $2,572.10 even if such representations had not been made by defendant. Both also admit that they were benefitted rather than injured by the payment to Hale as they were thus relieved from a much larger liability. (See cross-examination of Ming and Kinna. Record, p. 9-10-11.)